

**OFFICE OF ZONING AND ADMINISTRATIVE HEARINGS**  
**Stella B. Werner Council Office Building**  
**100 Maryland Avenue, Suite 200**  
**Rockville, Maryland 20850**  
**240 777-6660**

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**HEARING EXAMINER’S REPORT AND RECOMMENDATION OF DISMISSAL OF  
THE CASE BASED ON THE PARTIES’ JOINT STIPULATION OF  
DISMISSAL WITH PREJUDICE**

The case arose under the “Prevailing Wage Requirements” of Montgomery County Code Section 11B-33C, and involves an appeal to the CAO of a determination by the Montgomery

County Office of Procurement that Appellant Costello Construction of Maryland, Inc. (hereinafter, “Costello”), had violated the Prevailing Wage Law provisions in carrying out Contract No. 1019962, for the Silver Spring Library Project.

The matter was referred to the Office of Zoning and Administrative Hearings (OZAH) by memorandum from the Chief Administrative Officer (CAO) dated October 20, 2016. Exhibit 1. The CAO’s memorandum designates OZAH as the Hearing Officer in the case and directs OZAH to conduct a hearing in accordance with Chapter 2A of the County Code and make a report and recommendation for the CAO’s consideration.

OZAH advised the CAO’s office that the file could not be established until it received the Decision letter from which the appeal was taken and a full copy of Costello’s appeal letter. Exhibit 2. On December 21, 2016, the CAO’s office, forwarded OZAH the missing materials. Exhibit 6. These materials included a copy of the Corrected Decision letter of Cherri Branson, Director of the Office of Procurement (Exhibit 3), from which the subject appeal is taken; a copy of the Costello’s appeal letters, dated October 10, 2016, and October 18, 2016 (Exhibits 4 and 5), and other materials (Exhibits 7) relating to the case. OZAH accepted the case and established a file on December 21, 2016.

On December 23, 2016, the Hearing Examiner issued a Scheduling and Procedures Order, which set up a scheduling conference, and suggested alternative schedules for the hearing and prehearing proceedings in this case (Exhibit 8). The scheduling conference was held on January 11, 2017, and was attended by Assistant County Attorney Taggart Hutchinson, on behalf of Montgomery County, and by Nicole L Campbell, Esquire, attorney for Costello.

At the request of the Hearing Examiner, Ms. Campbell supplied the names and addresses of the relevant subcontractors (Exhibit 10) so that they could be notified of these proceedings.

The subcontractors referenced by Costello are Commercial Custom Cabinet, Inc., SCCP Contracting, Inc. and Young Electrical Contractors, Inc. On January 19, 2017, the Hearing Examiner issued a revised scheduling order and notice of hearing, which was served on all parties and subcontractors named by Appellant (Exhibit 11).

The only subcontractor to respond was SCCP, which initially indicated in a letter dated January 25, 2017 (Exhibit 12), that it would participate in the case and be represented by Costello's attorney. SCCP subsequently changed its mind, as set forth in a letter authored by Costello's attorney on February 15, 2017, and "seen and agreed to" by John Sulmonte, SCCP's Business Manager. Exhibit 16(a). The letter "confirm[s] that SCCP does not intend to participate in the appeal proceedings as a party or to intervene or to involve its owner attorneys in the proceeding."

On January 31, 2017, Costello and the County submitted briefs on the subcontractor participation issue. Exhibits 13(a) and 14(a) respectively. On February 15, 2017, Costello filed a Supplemental Brief (Exhibit 15) stating that "Commercial Custom Cabinets, SCCP Contracting, Inc., and Young Electrical Contractors, Inc. (the "Subcontractors") have reported to me that: (1) they do not wish to intervene as parties in this case and (2) they are satisfied with my representation of Costello Construction in this appeal defending against all allegations of the County, including those involving the Subcontractors."

In an Order issued on February 22, 2017, the Hearing Examiner ruled that because the subcontractors had been notified of this proceeding and had elected not to participate, the matter would proceed without their participation. Exhibit 17.

As mentioned above, Costello and the County subsequently negotiated a settlement of this matter, and on May 31, 2017, the parties signed a “Joint Stipulation of Dismissal,” reciting that they had “reached a negotiated agreement to resolve the above-captioned Appeal” and noting that “This Appeal accordingly can be DISMISSED WITH PREJUDICE.” Exhibit 24.

The enforcement provisions of the Prevailing Wage Law (Montgomery County Code §11B-33C (i) (7)) provide for the CAO to refer an appeal under the law to a Hearing Officer, who must review the case pursuant to the County’s Administrative Procedures Act (MC-APA), which is in Chapter 2A of the County Code:

*(7) A contractor may appeal a written decision of the Director that the contractor violated a provision of this Section to the Chief Administrative Officer within 10 working days after receiving a copy of the decision. The Chief Administrative Officer must designate a hearing officer to conduct a hearing under Chapter 2A upon receipt of a timely appeal. If the contractor does not appeal a written decision within 10 working days after receipt, the decision of the Director becomes final and binding.*

Section 2A-10 (a) of the MC-APA provides in pertinent part that “any decision stipulated to or consented to by the parties need only be reflected by an appropriate written order or consent decree.” Section 2A-10 (g) of the MC-APA provides:

*(g) Informal disposition. Where appropriate to the nature of the proceedings and the governing laws, informal disposition may be made of any contested case by stipulation, agreed settlement, consent order or default.*

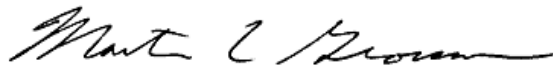
The Hearing Examiner concludes that the parties’ Joint Stipulation of Dismissal is an appropriate “informal disposition” of the case as provided in Section 2A-10(g), and as a result,

there is no reason to conduct a formal hearing. Therefore, the Hearing Examiner accepts the parties' Joint Stipulation of Dismissal and all other previously filed documents into the administrative record and hereby closes the record.

Since the Hearing Examiner does not have the authority to issue a final decision on behalf of the CAO, the Hearing Examiner is returning this matter to the CAO with the recommendation that the CAO accept the parties' Joint Stipulation of Dismissal and dismiss this case with prejudice.

Dated: June 9, 2017

Respectfully submitted,



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Martin L. Grossman  
Hearing Examiner  
Director, Office of Zoning and Administrative Hearings

Serve:

Nicole Campbell, Esquire  
Attorney for Appellant  
Taggart B. Hutchinson  
Assistant County Attorney  
Ramona Bell-Pearson  
Assistant Chief Administrative Officer